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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1995

AMPHITHEATER PUBLIC SCHOOLS, et al.,

Petitioners,

v.

FAITH AITKEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

PETITION FOR WRIT OR CERTIORARI

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86 pp

QUESTIONS PRESENTED

1. Where Arizona Revised Statute ("A.R.S.") § 23-1023(C) gives an employer or its worker's compensation insurance carrier a lien, for compensation paid, against proceeds actually collectable by the injured worker in a separate action against a third-party tortfeasor, and

Where A.R.S. § 12-2506(A-B), which allows recovery of damages from any defendant only proportionately to that defendant's percentage of fault, and where the fault of all parties and non-parties, including that of non-party employers who cannot be parties, is considered in reaching the percentage,

Does the Arizona Supreme Court's construction of these statutes, which is that together they require the lien under § 23-1023(C) to be reduced by the amount that the percentage of fault assessed against the non-party employer in the third party action reduces the worker's recovery from the third party under § 12-2506, create a taking without due process in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States?

2. Does this Court have jurisdiction to review and decide question number 1, where the claim that the Arizona Supreme Court's construction of A.R.S. § 23-1023(C) and § 12-2506 together creates a taking without due process in violation of the Fifth and Fourteenth Amendments of the federal Constitution was expressly raised for the first time in a motion for reconsideration to the Arizona Supreme Court after its opinion was issued?

LIST OF PARTIES

The parties to the proceedings below were Faith Aitken, the Industrial Commission of Arizona, Amphitheater Public Schools, and Unigard Insurance Company. There are no parents or subsidiaries.

Also, 28 U.S.C. § 2403(b) (printed in Petitioners' Appendix hereto, at A-42) may apply because the constitutionality of the construction of two Arizona statutes is drawn into question and therefore, three copies of this document are served on the Attorney General of Arizona.

The following entities filed amicus briefs in the Supreme Court of Arizona: Arizona Trial Lawyers Association, Southern Arizona Worker's Compensation Claimant's Attorney's Association, and Employers Insurance of Wausau.

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PETITION FOR WRIT OF CERTIORARI

Petitioners AMPHITHEATER PUBLIC SCHOOLS and UNIGARD INSURANCE COMPANY respectfully pray that a Writ of Certiorari issue to review the award and opinion of the Supreme Court of Arizona entered in the above-entitled proceeding.

OPINIONS BELOW

The Supreme Court of Arizona issued and filed its Opinion in *Aitken v. Industrial Commission* on October 17, 1995, and which is reported at 183 Ariz. 387, 904

P.2d 456 (Ariz. 1995) and reprinted in the Appendix hereto at pages A-1 through A-16, infra. Thereafter, the Supreme Court of Arizona denied the petitioner's motion for reconsideration on December 19, 1995, with said order being reprinted in the Appendix hereto at page A-36. A mandate was issued January 18, 1996, and is reproduced in the Appendix hereto at A-38.

The Opinion of the Court of Appeals of Arizona was filed May 14, 1992, and is reported at 173 Ariz. 300, 842 P.2d 1313, vacated at 183 Ariz. 387, 904 P.2d 456 (Ariz. 1995), and is reprinted in its entirety in the Appendix hereto at A-17 through A-25.

The administrative law judge in the Industrial Commission of Arizona issued his findings and award on May 8, 1991 (A-28 through A-35), and on August 6, 1991, entered his award affirming the findings and award. (A-26 through A-27). These findings and awards of the administrative law judge are unreported.

JURISDICTION

The original opinion of the Supreme Court of Arizona was filed October 17, 1995. A motion for reconsideration was timely filed with the Supreme Court of Arizona on October 31, 1995, and a supplement to motion for reconsideration was filed November 13, 1995, and was denied by order of the court on December 19, 1995 (See Appendix, page A-36), with the order of denial being entered December 21, 1995. A mandate was issued January 18, 1996 (See Appendix, page A-38). This Petition for Writ of Certiorari is filed on March 15, 1996, within ninety (90) days of December 19, 1995

This Court has jurisdiction to review the judgment and opinion of the Supreme Court of Arizona under 28 U.S.C. 1257(a), because the Supreme Court of Arizona has construed two Arizona statutes, Arizona Revised Statutes (hereinafter, "A.R.S.") § 12-2506(A) and (B) and § 23-1023(C) together in such a way that creates a taking of lien rights without due process, which is repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States. 28 U.S.C. § 2403(b) applies, and the Arizona Attorney General has been notified pursuant to Supreme Court Rule 29.(4)(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions, statutes and rules involved, which are set out verbatim at A-40 through A-52, infra, are: Fifth and Fourteenth Amendments to the United States Constitution; A.R.S. § 12-2506(A) and (B) and § 23-1023(C), and Rule 22 of the Arizona Rules of Civil Appellate Procedure.[1]

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[1]/ Two versions of A.R.S. § 12-2506 are printed in the Appendix at A-43 and A-45, because the statute was amended between the time of the awards and opinion of the Industrial Commission of Arizona and the Arizona Court of Appeals, and the opinion of the Supreme Court of Arizona. The amendments however, are not relevant to the issues in this petition.

STATEMENT OF THE CASE

1. Background facts of Arizona's worker's compensation lien, and the non-party at fault statute

Under Arizona's statutory worker's compensation scheme,[2] persons who elect to receive worker's compensation give up the right to directly sue their employer except in certain situations which are not relevant to this case.[3] Meanwhile, the worker is entitled to bring a case against third parties who contributed to their injuries. A.R.S. § 23-1023(B). An employer or its worker's compensation carrier has a lien against the amount actually collectable from the third-party tortfeasor in the third-party lawsuit. This lien is expressly set forth in A.R.S. § 23-1023(C) which states in pertinent part:

> "If [the worker] proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such

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[2]/ Ariz.Rev. Stat. § 23-901 et seq.

[3]/ *See Anderson v. Industrial Commission*, 147 Ariz. 456, 457, 711 P.2d 595, 596 (Ariz. 1985); A.R.S. §§ 23-906(A) 23-1022(A) (these statutes are not involved in the issues raised in this petition).

> compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expense, including attorneys' fees, actually expended in securing such recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. * * * "

In the third-party lawsuit that the worker brings against the third-party tortfeasor, that third-party defendant may obtain a finding of comparative fault based on a finding of fault of all persons who contributed to the loss. A.R.S. § 12-2506(A) and (B). This includes a finding of fault against non-party employers who, by virtue of the worker's compensation scheme, cannot be named as parties in the third-party action. The finding of fault against a non-party is not to be used for purposes of liability against any such non-party in any proceeding:

> "Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action."

A.R.S. § 12-2506(B).

These statutes come into play when the worker sues the third-party tortfeasor in a separate civil tort action. The defendant tortfeasor in that action names as many other persons to be at fault as he can in order to decrease his share of the overall damages. This includes naming the employer as a non-party at fault. No notice of this is required to be given to the non-party employer, nor is the employer or its worker's compensation carrier entitled to appear in the third-party action to defend against the finding of its fault, even it receives courtesy notice.

2. Specific facts and procedural history in this case.

Respondent Faith Aitken, while in the scope of her employment as a custodian with Amphitheater School District in Tucson, Arizona, was injured when she stepped out of a doorway and fell where a sidewalk had been removed by Maya Construction Company. She filed a worker's compensation claim and received $28,929.70 in benefits from Amphitheater's worker's compensation carrier, Petitioner Unigard Insurance Company. She also filed a separate civil third-party lawsuit against Maya. In that third-party civil suit, Maya alleged that Aitken was contributorily (meaning, comparatively) negligent and also named Amphitheater as a non-party at fault, as it is permitted to do under A.R.S. § 12-2506(B).

A jury in the third-party action assessed total damages of $319,292.00 and apportioned responsibility as follows: 65% to Maya, 25% to Amphitheater, and 10%

to Aitken. As a result, the judgment against Maya was only for 65% of the total amount, and the court entered judgment against Maya in the amount of $207,350.00.[4] From the awarded sum of $207,350.00, Aitken reimbursed Unigard $28,929.70 for benefits previously collected. Unigard thereafter claimed a lien credit against future compensation of $74,466.54, the amount remaining from the recovery after deductions for attorneys' fees and costs. Aitken paid Unigard the money for benefits previously collected, and the credit against future compensation was made pursuant to Arizona's worker's compensation statutory scheme.

Aitken challenged the lien and the credit under two Arizona constitutional provisions[5] which preclude the abrogation of any existing right of action to recover damages for injury, and that no law shall be enacted in Arizona limiting the amount of damages to be recovered for causing the death or injury of any person. Both the administrative law judge in the Arizona Industrial Commission of Arizona and the Court of Appeals of Arizona disagreed with Aitken, and held that Amphitheater and Unigard were entitled to their entire lien under A.R.S. § 23-1023(C) without any reduction, notwithstanding that Aitken's total damages in the third-party suit had been reduced by 25% due to a

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[4]/ There is no explanation why the judgment is $190 less than it should have been under a mathematical analysis, but that is not relevant here.

[5]/ The provisions of the Arizona Constitution are Article 18, § 6 and Article 2, § 31; they are not at issue in this Petition.

finding of fault in that action against the non-party employer Amphitheater. These decisions rested on prior case law which held that an employer's fault was not an issue regardless of how one may view the equity of the matter, and that any change of the lien rights was to be determined by the state legislature.

The Supreme Court of Arizona construed the statutes together without reaching the state constitutional issues. Instead, the court determined that the legislature merely failed to consider the effect of the lien provided for in A.R.S. § 23-1023(C) when it abolished joint liability and established nonparty fault in A.R.S. § 12-2506(B), which includes employer fault. Therefore, the Supreme Court of Arizona filled in what it considered to be the blanks unintentionally left by the legislature, and held in its opinion in this case that the lien is reduced by the amount of reduction of damages in the third-party suit resulting from the non-party employer's negligence as determined in that third-party suit.

Specifically, the Arizona Supreme Court held that an employer/carrier's lien under A.R.S. § 23-1023(C) may be asserted on third-party recoveries only to the extent that the compensation benefits paid exceed the employer's proportionate share of the total damages fixed by verdict in the action. 183 Ariz. at 392, 904 P.2d at 461. The court concluded that "the lien and any future credit should apply only to the extent that compensation benefits paid exceed the *negligent* employer's proportionate share of the total damages awarded in the third-party action." Id. (Emphasis added.)

The Respondents argued that under the principles of *res judicata* and collateral estoppel, a person not a

party to one suit must have a full and fair opportunity to litigate an issue or fact that is to be used against it in any way. (Answering Brief, pp. 23-27, Response to Petition for Review, p. 13, line 15 through p. 14, line 13.) However, the specific assertion that the Arizona Supreme Court's opinion of October 17, 1995 created a taking without due process in violation of the Fifth and Fourteenth Amendments to the federal Constitution were first raised in the motion for reconsideration filed October 31, 1995. The Supreme Court allowed the respondents to supplement their motion for reconsideration and a supplement was filed November 13, 1995, and the court allowed Aitken to file a response, which was filed November 17, 1995. The court also granted the motion of amicus counsel leave to join in the motion for reconsideration and to file an amicus brief, but then denied the motion for reconsideration December 19, 1995, and a mandate was issued January 18, 1996.

ARGUMENTS WHY THIS PETITION SHOULD BE GRANTED

I. The Arizona Supreme Court's decision in this case creates a taking of property without due process by reducing the employer/carrier's lien by a finding of non-party fault, where the employer is not entitled to defend itself, and this affects every worker's compensation case in Arizona involving a third-party tortfeasor.

The lien of A.R.S. § 23-1023(C) is a property right created by statute which attaches to the employee's total recovery from the third party. This property right is protected by the Fifth and Fourteenth Amendments to the United States Constitution, which forbid depriving owners of property without due process of law. Due process of law requires that there be an opportunity to be heard and to present every available defense. The Arizona Supreme Court's decision, reducing the reach of the lien based on a finding of non-party fault in the worker's third party action, takes property from the petitioners herein without providing them with an opportunity to be heard or defend themselves of the alleged negligence which reduces the reach of their lien, and therefore, is a taking in violation of the Fifth and Fourteenth Amendments.

The Arizona Supreme Court's decision in *Aitken* reaches far beyond the parties to this case. It affects

every worker's compensation case in Arizona that also involves a third-party tortfeasor, reducing the employers' or their carriers' liens by the employer's alleged negligence, as determined in a proceeding in which the employer is not entitled to defend itself. Federal due process is denied to the employers/carriers in every single one of those cases.

In prior decisions regarding the lien, the Arizona Supreme Court held that regardless of how one might view the equity of the matter, there was no reduction of the lien of A.R.S. § 23-1023(C) even where the employer was contributorily negligent. *See, e.g., Stroud v. Dorr-Oliver, Inc.*, 112 Ariz. 403, 409, 542 P.2d 1102, 1108 (1975). The lien was deemed to be fair under the system of joint and several liability, because an injured worker would receive worker's compensation from the employer, but would recover 100% of her tort damages from the third-party tortfeasor; the application of the lien avoided a double recovery to the worker, and the employer recovered what it paid out for compensation and medical bills. *See Ruth v. Industrial Commission*, 107 Ariz. 572, 574-76, 490 P.2d 828, 830-32 (Ariz. 1971).

But Arizona abolished joint liability in 1987 by providing in A.R.S. § 12-2506(A) that each party shall be liable only for their own fault, and *no more*. *See Neil v. Kavena*, 176 Ariz. 93, 95, 859 P.2d 203, 205 (Ariz.App. 1993). And in 1991, the Arizona Supreme Court held that the designation of an employer as a non-party at fault was authorized by A.R.S. § 12-2506. *Dietz v. General Electric Co.*, 169 Ariz. 504, 509, 821 P.2d 166, 171 (Ariz. 1991). This introduction of pure comparative fault, including the non-party fault of employers, led the Arizona Supreme Court to stress in *Aitken* that one of the

reasons supporting the lien, the prevention of a double recovery, no longer existed, because the recovery is reduced by the finding of the employer's negligence in the third-party action. *Aitken*, 183 Ariz. at 381-82, 904 P.2d at 460-61. The court states that it is the employer, not the employee, who should lose, despite its earlier rulings in cases such as *Stroud, supra. Id.* The court accepts that the finding against the non-party employer of its negligence is proof that the employer was actually at fault, and that an employer is not to benefit from its own wrong at the expense of the injured worker. *Id.* at 382, 904 P.2d at 461.

Despite the Arizona Supreme Court's right to interpret the Arizona legislature's statutes, goals or policies, or to make law on its own, the court's reduction of the statutory lien takes property in violation of due process rights because the employer has no right to defend itself so as eliminate its alleged fault in the third-party action which reduces its lien. The *Aitken* decision forces the employer to give up lien rights which attach to all amounts collectable in the recovery, and does so without due process.

A lien in property is a property interest under the due process and taking clauses of the Fifth Amendment. *See, e.g., United States vs. Security Industrial Bank*, 459 U.S. 70, 76-77,103 S.Ct. 407, 74 L.Ed.2d 235 (1982). This is true regardless whether the government is taking by eminent domain, or that the taking is from one private owner to give to another. *Id.* Further, the government is acting to deprive someone of their property whenever it enforces private claims to property of one person against another. *See, e.g., Sniadach vs. Family Finance Corp. of Bay View*, 395 U.S. 337, 339-42, 89 S.Ct. 1820, 23

L.Ed.2d 349 (1969) (garnishment action by creditor for debtor's wages require due process).

The lien provided to the employer/carrier under A.R.S. §23-1023(C) is a property right because the statute itself makes the lien attach to the whole amount collectable by the worker from the third party. The statute does not say that the amount actually collectable may be the total recovery; rather, the statue states that it shall be the total recovery. The total recovery is the amount collectable at the time of a judgment or settlement. *State Compensation Fund vs. Nelson*, 153 Ariz. 450, 453, 737 P.2d 1088, 1091 (Ariz. 1987). The Arizona Supreme Court noted in *Nelson*, *supra*, that it is the statute itself that defines the amount to which the lien attaches. *Id.* Other Arizona courts have likewise noted that the lien attaches to the entire recovery at the moment a judgment or settlement occurs. *See,e.g.*, *Polito vs. Industrial Commission*, 171 Ariz. 46, 48, 828 P.2d 182, 184 (Ariz.App. 1992)(stating that the lien attaches to the "entire recovery"); *Mannel vs. Industrial Commission*, 142 Ariz. 153, 156, 688 P.2d 1045, 1048 (Ariz.App. 1984)(lien applies to entire third-party recovery related to all damages, including pain and suffering, loss of pleasures in life, and a spouse's loss of consortium). The Arizona Supreme Court's decision in *Aitken* is a taking of the lien, because it reduces the lien by an amount equal to the reduction in damages in the third-party action, at the same time that the lien attaches to the entire amount collectable in the third-party action.

The taking of a lien requires due process under the Fifth and Fourteenth Amendments. *See, e.g.*, *Penrod vs. Financial Institutions Liquidation Corp.*, 50 F.3d 459, 464 (7th Cir. 1995)(due process satisfied because creditor

could have protected lien by appealing from order confirming plan of reorganization which dealt with its claim). "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane vs. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). "Due process requires that there be an opportunity to present every available defense." *Lindsey vs. Normet*, 405 U.S. 56, 66, 92 S.Ct. 862, 870, 31 L.Ed.2d 36 (1972).

In *Security Industrial Bank, supra,* at issue was a bankruptcy statute that permitted individual debtors in bankruptcy to avoid possessory, non-purchase money liens on certain property, including household furnishings and appliances. This Court held the statute to apply only prospectively, invalidating liens obtained after the effective date of the statute. In the instance case, the Supreme Court of Arizona's decision is common law, and has the effect of being retroactive as well as prospective, unless otherwise limited by the court. *See Lowing vs. Allstate Ins. Co.*, 176 Ariz. 101, 108, 859 P.2d 724, 731 (Ariz. 1993). The Aitken decision is not limited and is retroactive, and therefore it violates liens existing before the rule was issued. Even had the court's decision been intended to be prospective only (which it isn't), it still violates due process in this case because the rule is applied here to a lien which already attached.

This case is similar in many ways to the case of *Armstrong vs. United States*, 364 U.S. 40, 80 S.Ct. 1563, 41 L.Ed.2d 1554 (1961). There, Armstrong supplied materials to a builder of ship hulls and had materialmen's liens on the hulls until the bills were paid. Meanwhile, and before Armstrong took the steps necessary under Maine law to attach the liens to the vessels, the builder

defaulted under its contract with the United States, and the government took possession of the unfinished hulls pursuant to the contract. Thereafter, the government asserted an immunity to the liens. This Court held that although the liens had not attached, Armstrong was entitled to resort to the specific property for the satisfaction of its claims, and the government's action was a taking and that such a right is compensable by virtue of the Fifth Amendment.

In the instant case, the employer and its carrier were entitled to resort to specific property to satisfy their lien. Instead of being ship hulls, the specific property in this case is the total recovery from the third party. When the Supreme Court of Arizona ordered that the employee may keep a portion of the total recovery, i.e., the total amount collectable from the third party, and that such a portion of that total recovery is not subject to the lien, the court in effect has taken the property from the employer/carrier and given it the employee. As in *Armstrong*, the carrier's right to resort to the total recovery from the third party for the satisfaction of the lien, which is the amount of compensation and medical, surgical and hospital benefits paid along with future credits, is compensable by virtue of the Fifth Amendment.

A difference between the instant case and those cases discussed above is that the lien here is reduced because of what the Supreme Court of Arizona deems to be the employer's own negligence based on an apportionment of fault against the non-party employer in the third-party action under A.R.S. § 12-2506. However, nowhere is the employer's carrier or the employer entitled to notice or permitted to defend against the non-party

finding of fault in the third-party action, even though the result reduces its lien accordingly, and therein lies the taking without due process in violation of the Fifth and Fourteenth Amendment. The finding of non-party fault against the employer is made in an action where the employer has no notice or opportunity to defend. It doesn't matter that the employee theoretically could defend the employer; their interests are not aligned. There is no reason to assume a worker would defend an employer, because the employee easily could be inclined to attempt to apportion any fault to the employer where it cannot be attributed to the third party tortfeasor, and thereby reduce the employer/carrier's lien, and the third party tortfeasor has no reason to care otherwise. In trials to the court, judges can attribute as much fault to the employer as they desire in attempts to protect the worker's recovery from the lien. This is all done without the employer having any opportunity to defend. The employer simply has nowhere to turn, because it has no opportunity to be heard, yet its lien is reduced accordingly. This is fundamentally unfair and an obvious denial of due process.

II. This Court's jurisdiction to grant this petition and review the Arizona Supreme Court's decision has been adequately preserved by the raising of the takings in violation of due process of the Fifth and Fourteenth Amendments in the motion for reconsideration to the Arizona Supreme Court.

Petitioners argued to the Arizona Court of Appeals and the Supreme Court of Arizona the principals of *res judicata* and collateral estoppel, and the requirements that

a person not a party to the first suit must have a full and fair opportunity to litigate the issue. (Answering Brief, pp. 23-27; Response to Petition for Review, p. 13, line 15 through p. 14, line 13.) The essence of that argument is that where the employer has no opportunity to defend itself in the third-party action in which its lien is reduced, then a reduction based on such a finding violates the principles of *res judicata* and collateral estoppel.

The specific reference to the Fifth and Fourteenth Amendments to the Constitution to the United States, and the assertion that this is a taking in violation of the due process clauses of the Fifth and Fourteenth Amendments, was raised in the motion for reconsideration which was timely filed October 31, 1995 following the opinion of the Arizona Supreme Court on October 17, 1995. The Supreme Court of Arizona allowed these petitioners to supplement the motion for reconsideration, allowed amicus counsel to join the petitioners in the motion for reconsideration, and allowed Aitken to file a response. The court denied the motion for reconsideration December 19, 1995, without opinion.

This Court has jurisdiction to grant certiorari review of constitutional claims that were raised in the Arizona Supreme Court on motion for reconsideration.[6] *See Bankers Life & Casualty Company vs. Crenshaw*, 486

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[6]/ A motion for reconsideration took the place of a request for rehearing in the appellate courts of Arizona. *See* comment following 1983 amendment to Rule 22, Arizona Rules of Civil Appellate Procedure, Vol. 17B, Arizona Revised Statutes Annotated (1988), in Appendix at A-50 through A-52.

U.S. 71, 77, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988). Such jurisdiction exists even if there is a procedural bar in the state court to hearing a claim first raised on a petition for rehearing, if the state court does not strictly or regularly follow such a procedural rule precluding review of issues raised for the first time in a petition for rehearing. *See Hathorn vs. Lovorn*, 457 U.S. 255, 262-65, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). A procedural rule which is subject to discretion is not applied regularly. *See, e.g., Johnson vs. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988).

In *Bankers Life, supra,* this Court held that references in a rehearing petition that constitutional principles were violated, but without reference to what constitutional provisions were allegedly violated, was insufficient to preserve for this Court the review of those issues, which were that the decision violated the due process clause or contracts clause of the federal Constitution. 486 U.S. at 76-77. This Court then inferred that had the due process and contract clauses specifically been referenced in the petition for rehearing, they would have adequately been raised even though the Mississippi Supreme Court denied the Petition for Rehearing. *Id.* at 77.

The Petitioners' motion for reconsideration in this case was filed pursuant Rule 22 of the Arizona Rules of Civil Appellate Procedure, which provides that the contents of the motion " ... shall be directed solely to discussion of those specific points or matters in which it is claimed the appellate court erred in determination of facts or law." However, the Supreme Court of Arizona has discretion to hear a constitutional issue on appeal, at any time during the pendency of the appeal, where the

issue is of statewide public importance and does not require any new facts to be determined. *Barrio vs. San Manuel Division Hospital*, 143 Ariz. 101, 104, 692 P.2d 280, 283 (Ariz. 1984); *Rubens vs. Costello*, 75 Ariz. 5, 251 P.2d 306 (Ariz. 1952); *Hawkins vs. Allstate Ins. Co.*, 152 Ariz. 490, 502-03; 733 P.2d 1073, 1085-86 (Ariz. 1987)(court declined to exercise its discretion to hear new constitutional issue).[7] In *Love vs. Bracamonte*, 29 Ariz. 537, 241 P. 514, 515 (Ariz. 1925), the court refused to consider arguments raised for the first time on rehearing, but the propositions urged for the first time in *Love* were not constitutional issues of statewide importance, and no general rule was announced for all cases by the court in *Love*. The court will exercise its discretion to hear newly raised constitutional issues where the public interest is better served by having the issued considered rather than deferred. *Dombey vs. Phoenix Newspapers*, 150 Ariz. 476, 482, 724 P.2d 562, 568 (Ariz. 1986).

The Arizona Supreme Court's decision in *Aitken* immediately impacts every worker's compensation case and connected civil suit involving issues and findings of the employer's non-party fault, and does not require the determination of any new facts, and the issue is one which should be resolved earlier rather than being deferred. Therefore, the constitutional issues raised in the motion for reconsideration are issues which the Arizona Supreme Court could have heard within the framework of applying its discretion, as described above. Further, since

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[7]/ These principles above have been applied by another court to issues first raised in a motion for rehearing after a decision. *See In re Riverton State Bank*, 49 P.2d 637, 638 (Wy. 1935).

the Supreme Court of Arizona denied the motion for reconsideration without opinion, this Court should not even conclude that the state court applied any type of procedural bar. *See Harris vs. Reed*, 489 U.S. 255, 261-66, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Michigan vs. Long*, 463 U.S. 1032, 1042, and n.7, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)(required that a plain statement that a procedural bar is applied, otherwise this Court should infer that no procedural bar was employed.)

For all the foregoing reasons, this Court has jurisdiction to grant and should grant the Petition for Writ of Certiorari in this matter.

CONCLUSION

The Arizona Supreme Court's decision in *Aitken* affects not only the instant case, but every worker's compensatiase in Arizona involving a third-party tortfeasor. Federal due process is denied to the employers or their carriers in every single one of those cases, because the lien is reduced, and therefore is taken, without the due process required by the Fifth and Fourteenth Amendments to the federal Constitution.

Respectfully submitted, March 15, 1996
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